Filed 3/25/14 In re J.T. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.T., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.T., Defendant and Appellant.	E059626 (Super.Ct.Nos. J246002 & SWJ1100735) OPINION

APPEAL from the Superior Court of San Bernardino County. Brian Saunders, Judge. Reversed with directions.

Theresa Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jurisdictional hearing, the juvenile court amended the Welfare and Institutions Code section 602 petition and found defendant and appellant J.T. (minor) was an accessory after the fact to a vehicle theft (Pen. Code, § 32).[1] The court found insufficient evidence to make a true finding on the charged offense of receiving a stolen vehicle (§ 496d, subd. (a)). Minor was subsequently continued a ward of the court and ordered to serve 78 days in juvenile hall. Minor's sole contention on appeal is that the juvenile court violated his due process rights when it unilaterally amended the petition at the conclusion of the jurisdictional hearing, because the charge of being an accessory is not a lesser included offense of receiving a stolen vehicle and minor did not consent to the substituted charge. We agree with the parties and will reverse the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On August 1, 2013, at about 5:45 a.m., Eloy Garcia walked out of his residence and noticed that his Lincoln Town Car (Lincoln) was missing. He also noticed that the glove compartment of his Cadillac was open and that the spare key to the Lincoln he kept in the Cadillac glove compartment was missing. Garcia's wife called the police and reported the Lincoln as stolen.

Later that day, Fontana Police Officer Burnside observed the Lincoln with three occupants inside, including minor, who was the rear passenger. Officer Burnside pulled

[1] All future statutory references are to the Penal Code unless otherwise stated.

behind the vehicle to pull it over; however, as soon as the driver noticed the officer, the driver attempted to flee. While attempting to flee, the driver lost control of the car and the car came to a stop.

Once back-up units arrived, the three occupants were taken into custody. Inside the Lincoln, Officer Burnside found a slim jim, a device commonly used in auto thefts, a key belonging to the Lincoln in the ignition, two black cotton gloves, and one blue cotton glove. Officer Burnside had previously seen the driver wearing two gloves on his hands and minor wearing one blue glove on his right hand. Minor claimed that he did not know the vehicle was stolen.

The parties stipulated that the two sets of latent fingerprints recovered from the slim jim did not match minor or the driver. Minor's father testified that prior to the Lincoln being stolen, he had heard his son and two of his friends talking about burglarizing cars so that they could get money to buy drugs.

Following closing arguments, the juvenile court stated: "There are some issues with regard, I believe, to the unlawful driving or taking or the 496 as alleged. I do, however, find no problem with the violation of Penal Code section 32 [accessory after the fact] . . . ." The court thereafter explained the evidence supporting a true finding on the offense of accessory after the fact. The court did not find the charged crime of receiving a stolen vehicle to be true.

II

DISCUSSION

Minor claims he was deprived of his constitutional right to due process when the juvenile court made a true finding on the crime of accessory after the fact. He argues that the accessory offense was never charged in the petition and the People never moved to amend the petition to include the accessory offense. Minor further asserts that accessory after the fact is not a necessarily included lesser offense to receiving a stolen vehicle and that he never consented to a finding on the substituted charge. The People concede these points, and we agree.

"'[Due] process requires that a minor, like an adult, have adequate notice of the charge so that he [or she] may intelligently prepare his [or her] defense. [Citations.]' Compliance with this requirement has been held by the Supreme Court to mandate that the minor 'be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation.'" (*In re Robert G.* (1982) 31 Cal.3d 437, 442; see also *In re Hess* (1955) 45 Cal.2d 171, 175.) Consequently, "a wardship petition under [Welfare and Institutions Code] section 602 may not be sustained upon findings that the minor has committed an offense or offenses other than one specifically alleged in the petition or necessarily included within an alleged offense, unless the minor consents to a finding on the substituted charge." (*In re Robert G.*, *supra*, at p. 445; see also *In re Johnny R.* (1995) 33 Cal.App.4th 1579,

1583-1585 [Division One of this court held the juvenile court erred by allowing, over the minor's objection, a late amendment to add an offense not included in the original petition.].)

The trier of fact may "find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." (§ 1159.) "We employ two alternative tests to determine whether a lesser offense is necessarily included in a greater offense. Under the elements test, we look to see if all the legal elements of the lesser crime are included in the definition of the greater crime, such that the greater cannot be committed without committing the lesser. Under the accusatory pleading test, by contrast, we look not to official definitions, but to whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime." (*People v. Moon* (2005) 37 Cal.4th 1, 25-26; see also *People v. Birks* (1998) 19 Cal.4th 108, 117; *In re Marcus T.* (2001) 89 Cal.App.4th 468, 471.) A conviction on a crime neither charged nor necessarily included in a charged crime violates the defendant's due process rights. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369.) A de novo standard of review applies to the court's ruling. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

The elements test is unsatisfied because the legal elements of receiving a stolen vehicle do not include the legal elements of accessory after the fact. To sustain a conviction for receiving a stolen vehicle in violation of section 496d, subdivision (a), the prosecution must prove: (1) the vehicle was stolen; (2) the defendant knew the vehicle

was stolen; and, (3) the defendant had possession of the stolen vehicle. The crime of accessory after the fact in violation of section 32 provides: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony." "It seems clear that assisting a principal after the commission of a crime is not necessarily included in the main crime itself in the sense of section 1159." (*People v. Brown* (1955) 131 Cal.App.2d 643, 658; see also *People v. Nguyen* (1993) 21 Cal.App.4th 518, 537 ["Being an accessory is not a lesser included offense within aiding and abetting."]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425.)

Further, the accusatory pleading test is unmet. Minor was charged in the petition with one count as follows: "On or about August 1, 2013, in the above named judicial district, the crime of receiving stolen property, motor vehicle, in violation of Penal Code [s]ection 496d(a), a felony, was committed by [minor], who did unlawfully buy and receive a white Lincoln Towncar . . . that was stolen and had been obtained in a manner constituting theft and extortion, knowing the property to be stolen and obtained, and did conceal, sell, withhold, and aid in concealing, selling and withholding said property. . . ." (Capitalization omitted.) Under the "accusatory pleading" test, a lesser offense is included within the greater offense if "the *facts actually alleged* in the accusatory pleading, include all the elements of the lesser offense." (*People v. Birks*,

supra, 19 Cal.4th at p. 117, italics added; see also *People v. Lopez* (1998) 19 Cal.4th 282, 290.) Hence, the relevant inquiry is what is specifically alleged in the petition and does not include consideration of the evidence adduced at trial. (*Ibid*.) The accusatory pleading did not have the mental state requirement for the accessory after the fact offense.

The parties do not dispute that minor did not have notice of the accessory offense "sufficiently in advance of the hearing" (*In re Robert G.*, *supra*, 31 Cal.3d at p. 442) to prepare a defense to the allegation. The parties also do not dispute that accessory after the fact is not a lesser included offense of receiving a stolen vehicle under either the elements test or the accusatory pleading test. Moreover, the parties agree that minor did not consent to the juvenile court's unilateral amendment, despite minor's silence at the jurisdictional hearing. Indeed, under these circumstances, courts have held that a failure to object to a conviction of a lesser related offense does not constitute consent. (*In re Alberto S.* (1991) 226 Cal.App.3d 1459, 1465-1466; *People v. Delahoussaye* (1989) 213 Cal.App.3d 1, 11-13; *People v. Delgado* (1989) 210 Cal.App.3d 458, 463-464.) The court in *In re Alberto S.* explained: "While an objection at this point would have afforded the court an opportunity to correct its mistake and acquit the minor outright, it would not have affected the fact that the court had no jurisdiction to find minor had committed the uncharged offense. The court had already found that the evidence was insufficient to sustain the charged offenses and had, in effect, acquitted the minor. The minor cannot be

held accountable for the court's action, which exceeded the bound of its authority." (*In re Alberto S., supra,* 226 Cal.App.3d at p. 1466.)

Accordingly, we agree with the parties that the juvenile court erred in finding true the crime of accessory after the fact.

III

DISPOSITION

The finding that minor committed accessory after the fact is reversed. The matter is remanded to the juvenile court with directions to dismiss the underlying petition.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.